United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2073

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2073
(76-2085)

MILTON SILVERMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from Orders of the United States District Court for the Southern District of New York, Palmieri, J., Denying a 28 U.S.C. §2255 Petition To Set Aside Petitioner's Prior Conviction in that Court and Denying a Motion (F.R. Civ. P., Rule 60(b)) to Correct and Set Aside that Order

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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MILTON SILVERMAN,

Petitioner-Appellant,

-against-

Docket No. 76-2073
(76-2085)

UNITED STATES OF AMERICA,

Respondent-Appellee.

- - - - - - - - - - - - - - - - - - - -X

APPELLANT'S BRIEF

ISSUES PRESENTED

1. Should the District Court have granted the petition to set aside appellant's previous conviction on the untraversed showing that it was tainted by the knowing use of perjured testimony, suppression of exculpatory evidence and denial of due process?
2. Should the District Court at the very least have granted a hearing on such a showing?
3. Was it error to hold, as did the court below, that petitioner-appellant had failed to make a sufficient showing even to require a hearing while refusing to require the government to produce essential evidence solely in its possession which would have shown that a hearing should have been held and the petition granted?

4. On remand, should this proceeding be assigned to another judge?

STATEMENT OF PROCEEDINGS

This appeal, pursuant to 28 U.S.C. §1291, seeks review and reversal of the order entered in the United States District Court for the Southern District of New York on May 7, 1976, by the Honorable Edmund L. Palmieri, United States District Judge, denying the petition, pursuant to 28 U.S.C. §2255, of Milton Silverman to set aside his conviction in 68 Cr. 762 on the grounds that the judgment of conviction in that case on or about April 25, 1969, was the product of the prosecution's (1) knowing use of perjured testimony; (2) failure to disclose and suppression of evidence helpful to the defendant; (3) intimidation of prospective witnesses for the defense; (4) failure to prove an offense; and (5) use of false evidence that petitioner allegedly "dominated" the affairs of the Union locals, the affairs, records and finances of which he was accused of mishandling.(4,154,116)* No hearing or argument was allowed on the petition. Appeal was also taken from the order and opinion of July 16, 1976, denying petitioner-appellant's motion pursuant to F.R.C.P., Rule 60(b), to

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* References in the form, e.g., "(4, 154, 116)",are to the pagination of the joint appendix on this appeal prepared by appellant. Those references are to the largest numbers appearing seriatim at the bottom of each page of the appendix.

correct factual, legal and procedural errors in the previous opinion and order. (167,155). The appeal from the second order (Docket No. 76-2085) has been consolidated with that from the first (Docket No. 76-2073).

The issues raised by the petition below were not raised by, nor available to, Mr. Silverman on his direct appeal to this court from his conviction in 68 Cr. 762, 430 F.2d 106 (2d Cir. 1970) cert.den. 402 U.S. 953, reh. den. 403 U.S. 924 (1971), nor on his appeal from denial of a new trial, 469 F.2d 1404 (2d Cir. 1972), cert. den. 411 U.S. 982 (1973).

The indictment that underlay the conviction which the petition below attacked (as it remained after this Court's reversal of the conviction on the first eight counts of 68 Cr. 762 on the original appeal, 430 F.2d 106, 126-8 (2d Cir. 1970)) as amplified by the prosecution's evidence at the trial charged petitioner with:

> (a) embezzlement, conversion, and misappropriation of the $1,000 proceeds from the sale to a junk dealer of an airconditioning unit allegedly belonging to a union Welfare Fund in violation of 18 U.S.C., Sec. 664 (count 14);
>
> (b) embezzlement, conversion and misapplication alleged to be in violation of 29 U.S.C., Sec. 501 (c) concerning funds of Local 810, I.B.T., allegedly used by petitioner, an officer, without proper

authorization, for I.B.T. Convention expenses (count 9), Christmas gratuities (counts 10 and 12), and personal loans (counts 11 and 13);

(c) causing false entries to be made in the Local 810 executive board minutes concerning the authorization of the Christmas gratuity and personal loan expenditures which were the subject of the preceding counts (count 18), in violation of 29 U.S.C., Sec. 439 (c);

(d) causing a false statement to be made in a form LM-2 submitted to the Secretary of Labor by Local 810 concerning union expenditures which were allegedly amounts embezzled, converted and misapplied by petitioner, in violation of 29 U.S.C., Sec. 439(b) (count 15). (5-6)

Petitioner has served the eight month sentence and paid the cumulative fine of $1,000 per count as sentenced by Judge Palmieri on or about April 25, 1969. However, petitioner seeks relief from the other consequences of his conviction such as the five year ban from union or union related employment, his life's occupation and the other disabilities and disadvantages resulting from the conviction. (6).

The petition below, 75 Civ. 4989, filed October 8, 1975, was assigned by the district court clerk's office automatically to Judge Palmieri who had presided at petitioner's original trial and sentenced him (1,2,4). A hearing was requested. (23). The government's memorandum and affidavit in opposition was filed on or about January

30, 1976. (2, 90, 93). Petitioner's reply affidavit was filed on or about March 9, 1976. (2, 107).

Petitioner's counsel also served on the United States Attorney's office a subpoena duces tecum calling for the production of essential documents and evidence in the sole possession of the government (further detailed infra) for use in aid of the petition. (110, 138A). This subpoena was admittedly ignored by the United States Attorney's office. (144).

Petitioner's counsel had in the petition itself pointed out that over a year prior to the filing of the petition counsel had sought the production of such material from the United States Attorney's office but that, although promised, it was not forthcoming (18n.). The aid of the court was sought to compel the production of this evidentiary material (18). That aid was not forthcoming, although in a letter of February 10, 1976 to the court and petitioner's counsel it was stated by the United States Attorney's office that such material existed (169-71,182-3) and a later in camera submission to the court after the petition had already been denied also confirmed the existence of such material. (160, 173-7).

Instead, the court below, on or about May 7, 1976, denied the petition without argument or hearing and without requiring the production of such essential evidence. (2, 3, 132).

In a motion pursuant to F.R.C.P., Rule 60(b) to vacate the May 7th opinion and order, to compel the production of the evidence specified in the subpoena duces tecum, and for other relief, petitioner's counsel pointed out that the decision came as a surprise since the Assistant United States Attorney in charge of the case had informed counsel that he had sought and received from the court an adjournment of the subpoena, it was never contemplated that a ruling on the petition should be had without at least a chance to be heard on the enforcement of the subpoena, and the May 7th opinion stated that petitioner had not made a showing that the government had suppressed evidence in connection with the knowing use of perjured testimony of an essential government witness at the trial when the subpoenaed material would have made that showing. (134-6, 150-3). Petitioner had also made an application to the Department of Justice (the only other source) under the Freedom of Information Act for production of essential documents in its possession

but the Department refused to expedite the appeal from its initial denial of the application with knowledge of the pendency of the petition. (110-11). That fact was also brought to the attention of the court below. (Ibid.)

The court below denied the aforesaid motion, noting in its opinion, that it had considered in camera a prosecutor's memorandum (not disclosed at trial or below), which clearly was relevant to the perjury of a prime government witness and the prosecutor's knowledge thereof, and which the government had failed and refused to disclose to petitioner, in overruling on the merits an essential issue of the petition. (160-1).

STATEMENT OF THE CASE

The first issue presented by the petition was that Mr. Silverman's conviction under count 18 of indictment 68 Cr. 762, charging the falsification of union executive board minutes as to the authorization of a loan and Christmas gratuity expenditures was the product of the knowing use of the perjured testimony of Jacob Friedland. (7-15). Friedland had been retained by the Union, Local 810, I.B.T., to examine its records, including the minutes, after service upon it of a grand jury subpoena duces tecum out of the Southern District of New York for those records. (7-8). Friedland subsequently issued a confidential report, before the records were surrendered to the grand jury, which stated, inter alia, that he found no authorization for such expenditures in the minutes. (8-10, 42). However, the minutes when produced for the grand jury and offered in evidence at Mr. Silverman's trial appeared to contain such an authorization (8-9), giving rise to the charge of alteration. See 430 F.2d 106, 120-1.

At the trial, Judge Palmieri rejected the defense claim of attorney-client privilege and would have ordered Friedland to testify but for an invocation of his Fifth Amendment rights against self-incrimination which the

judge also indicated he would have rejected had the prosecutor not admitted that he knew of a basis for such invocation. (11-13). The following exchange took place:

> "THE COURT: Do you know of any evidence, Mr. Maloney, which would possibly link Mr. Friedland with the alleged fabrications of the portions of these minutes, Exhibits 3 and 5?
>
> MR MALONEY: Yes, your Honor, I am afraid I do, but it is not before your Honor or before this Court." (T.646-7, emphasis added) (13)*

At the conclusion of the trial, the prosecutor, Andrew Maloney, Esq., represented that he had secured authorization from the Department of Justice to grant immunity to Friedland, who then testified, as a rebuttal - the ultimate - witness in the case. (8, 11, 13). He testified that he had no recollection of the original state of the executive board minutes and could only say that they appeared to have been altered by comparing the version of them in evidence with his confidential report and that he personally did not know what changes had been made in them. (8-9).

Annexed to the petition below and in support of the

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* Internal references in the form "T._____" are to the trial transcript as it was reproduced in the appendix on petitioner's original appeal in Docket Nos. 33584 and 34392 (430 F.2d 106).

claim that Friedland's testimony was perjured were:

> 1. The affidavit of the recording secretary of the union executive board that she had made the changes in the minutes at the direction of Friedland without any consultation with Mr. Silverman, that she had not disclosed this previously because she had been the subject of repeated grand jury subpoenas, told she was a target and never granted promised immunity, accordingly fearful. (9, 10-11, 25-30);
>
> 2. the affidavit of a Local 810 vice-president who was a witness to Friedland's direction of the change of the minutes, who also had not previously disclosed that fact because of the same pressures exerted upon him as upon the secretary (suppression the petition contends) (9, 10-11, 44-7);
>
> 3. the affidavit of Herman Brickman, an independent arbitrator, having no connection with the union, who happened to be there because of a recessed arbitration, who was also present when Friedland directed the change of the minutes and who had not come forward previously because he was ignorant of the criminal proceedings and that Friedland had testified. (9-10, 48-50).

Pursuant to an application under the Freedom of Information Act it was learned that Mr. Maloney, shortly before Friedland testified, had written the Department of Justice a memorandum stating the facts in support of his application for immunity (110-111). The existence of this memorandum was not disclosed to the trial court or to the defense. Indeed, in his affidavit in opposition to the petition below, Mr. Maloney did not disclose the existence of that memorandum but merely stated that "the government did not know what in fact his [Friedland's] testimony would be." (91).

The sole affidavit in opposition submitted - Mr. Maloney's - did not deny that perjury had been committed, nor that after that testimony was given at the time of the trial he knew it was perjurious but allowed it to stand, nor did it deny suppression of prospective defense witnesses' testimony as aforementioned, nor any other allegation of the petition. (90-2).

Application to produce the Maloney memorandum re Friedland's testimony by administrative appeal under the F.I.A., by subpoena, by motion to the court, were all either ignored, not acted upon or denied. (110-11, 138A, 18, 115, 133-6, 132, 144, 165). Nonetheless, the court below held in its original opinion that petitioner had not made a sufficient showing either that Friedland's testimony was perjured or that the prosecution knew of it. (123-4, 127-8).

After all the pleadings, papers and process had been filed in connection with the original petition and the Rule 60(b) motion, the government belatedly decided to submit to the court in camera and "under a bond of confidentiality" (176) the Maloney memorandum on Friedland's testimony which until this day neither petitioner nor counsel has seen (2,173-5). In its second opinion, the court below upheld this submission over petitioner's

strenuous objections. (160,173-5). In that opinion, the court below used that undisclosed memorandum to uphold the dismissal of the petition on the merits (Ibid.) although that opinion itself states, "The Maloney memorandum indicates that the prosecutor surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books." (161). That "surmise" was not made available to the defense at trial. The second opinion accepts the prosecution's position that a prosecutor who "is not certain" what a witness he sponsors will testify to before he takes the stand is under no obligation after the witness testifies to indicate the basis for his belief that testimony was perjured, nor to disclose exculpatory evidence afterward. (161). The opinion evaluated the petitioner's claim as to use of Friedland's testimony as though disclosure had been made and a hearing held when neither had occured. (161-2).

The opinions below dealt similarly with the three proposed witnesses whose affidavits are summarized, supra. (120-1, 127-8, 163-4). The two union employees were assumed to be under "the dominion and control" of petitioner although petitioner's connection with the union and thus assumed power over its employees was perforce severed by

his conviction several years prior to the affidavits (124, 162, 164). The court assumed these witnesses were available to petitioner at his trial despite their statements that the barrage of grand jury subpoenas, threats of prosecution and failure to grant promised immunity were effective prosecutorial suppression. (124, 126-7, 164). The prosecutor involved made no attempt to deny he took such suppressive measures in his affidavit in opposition to the petition (90-2). The court's opinions discredit their testimony in advance without a hearing.

In the court's first opinion, the independent arbitrator was disposed of in like fashion since the court, having presided at the trial concluded, erroneously, that the proposed witness had been general counsel to the union and had testified at the trial. (120-1). When that error was pointed out to the court (137), it stated in its second opinion that even though it had erred and the witness may not have been available to petitioner, its conclusion remained unaltered - therefore it was unnecessary to hear the arbitrator's testimony nor to take steps to preserve it (as requested by petitioner since the arbitrator was in his eighties). (163-4, 137).

In each of its opinions the court below, without a hearing, equates the evidence petitioner sought to offer on the issue of perjury as though it were merely impeaching and applied the latter standard to deny the petition. (127, 163-4).

Friedland's perjured testimony on Count 18 of indictment 68 Cr. 762 influenced the jury's conviction on all counts. (8). As he was the last witness at the trial, his testimony had the final impact on the jury. (Ibid.) As count 18 charged a general falsification of union records it perforce must have seemed to embrace the other counts on which conviction was had - misapplication of funds and submission of false reports which were in turn based upon the underlying union records. (Ibid.). At the original trial Judge Palmieri charged the jury that the evidence of fabrication of union records under count 18 should be considered in connection with all the evidence in the case (Ibid.). On appeal, this Court viewed count 18 as the primary charge, 430 F.2d 106, 120-1 (2d Cir. 1970).

The petition below presented the issue of the knowing use of perjury on the sole incriminatory testimony to secure conviction on another count, 14, which charged Mr. Silverman with conversion of an asset of the Welfare Fund.

(15-18). That testimony, given by one Chlystun, an employee of the general contractor engaged by the Welfare Fund to construct a new medical center and administrative building, was that Chlystun gave Mr. Silverman $1,000 in cash, which represented the proceeds from the sale to a junk dealer of two old air-conditioning units as scrap that were in the building the Welfare Fund had purchased for renovation. (16).

Count 14 as well as count 18 may well have influenced the conviction on all other counts since it was the only instance to which the prosecution could point of a direct conversion of a union or Welfare Fund asset into cash for petitioner's benefit in a transaction not recorded in Fund or union reports or records. (18).

In support of this second instance of the knowing use of perjured testimony, the petition annexed the affidavits of the following:

(1) Lawrence Cohen, a project engineer for the general contractor who was in charge of the Welfare Fund demolition and construction project and the superior of Chlystun. He was prepared to testify at the hearing re-

quested below that under the sub-contract to the heating, ventilating and air-conditioning firm Morrison & McCarthy and under industry custom, the title to the old air-conditioning units, which had been designated as scrap for removal, was in the sub-contractor and any return thereon belonged to the sub-contractor. He would also have testified that he directed Chlystun to contact one Irving Marcus, a principal at Morrison and McCarthy about the removal of the old air-conditioners (not Milton Silverman) and that Chlystun had reported he had done so, that the units had been removed, but that Chlystun made no report of any payment by the junk dealer. When interviewed by an F.B.I. agent about Milton Silverman, the agent questioned Cohen only about cabinet work done by the general contracting firm at Mr. Silverman's home but asked no questions about any material removed from the Welfare Fund job, the ownership thereof or payment therefor. Mr. Cohen did not know the nature of Chlystun's

testimony until it was recently shown him. (16-17, 51-4).

2. Robert Blakeman, the attorney for the general contractor on the Welfare Fund job who drafted the general and sub-contracts on that job (17, 55-7), copies of which were submitted below with his affidavit (58-81). His affidavit stated "unequivocally" that by contract and trade usage the air-conditioning units were the property of the air-conditioning subcontractor whose responsibility it was to remove them as scrap (55-7). Mr. Blakeman's affidavit states that he, the president of, and anyone else at, the general contracting firm, were not contacted by any officer or agent of the government about the ownership of the air-conditioning units or any other material removed in the course of the Welfare Fund job. (57).

In addition, petitioner brought to the attention of the court that agents of the government had questioned Marcus, the representative of the air-conditioning sub who made the arrangements for the removal and sale of the old air conditioners as scrap but did not call him as a witness at the trial (17-18).

Petitioner requested, to no avail, that the court require that the United States Attorney's office disclose what it had learned from that and other representatives of the sub (18) which would reflect on the Chlystun perjury. That material also came under the third category of the subpoena duces tecum served upon attorney for respondent (138A, 141) which he ignored (144) and which the court refused to enforce (156). Also covered by that category in the subpoena were statements of the witness Chlystun in the government files not shown to the defense at trial that Chlystun was eager to secure petitioner's conviction and attributed the $1,000 he claimed to have given petitioner as proceeds from the sale of items removed in the demolition of the interior of the Welfare Fund building other than the old air conditioner (114), contrary to his trial testimony.

The petition contended that all these factors showed that the prosecution knew or should have known that Chlystun testified falsely about the payment to petitioner but allowed the testimony to stand uncorrected and failed to reveal the information necessary to demonstrate that at the trial. (15-18).

The affidavit in opposition of the Assistant United

States Attorney - the only factual submission by respondent - is completely silent on this issue (90-2).

Without requiring the necessary material to be produced and without making any determination as to whether the prosecution had in its possession at trial information that Chlystun had perjured himself and otherwise in aid of the defense on that transaction, the court below treated the issue as an attempt to relitigate count 14, a "suggestion utterly without validity". (129).

The petition also offered newly discovered evidence that as the aforementioned scrapped air conditioning units were not the property of the Welfare Fund, petitioner did not and could not have committed the crime alleged in count 14, the conversion of union related assets. (18-21). Neither the affidavit in opposition nor the decisions below dealt with this issue.

At the trial, on the original appeal, 430 F.2d 106, 123-4, and in the proceedings below, respondent and the district court regarded as central to the disposition of the case petitioner's alleged "domination and control" of the unions and their employees. (90-1, 124). Petitioner offered newly discovered evidence that this issue had been erroneously injected into the trial owing to

the erroneous attribution to petitioner of the authorship of a so-called gag order. (21-3). Petitioner made this showing to demonstrate an additional ground for his likelihood of prevailing on a new trial if any counts survived the petition. (22-3). The decision below held petitioner foreclosed on this issue since he himself denied authorship of the "gag order" when confronted with it by the prosecution at the trial and described the issue as a burden to the court. (132).

A R G U M E N T

POINT 1

THE RELIEF REQUESTED IN THE PETITION SHOULD HAVE BEEN GRANTED AND THE CONVICTION VACATED.

The impact of the evidence produced under count 18 - Friedland testimony now known to be perjurious - on petitioner's conviction was noted by this Court on the original appeal:

> "Both by the government at trial and by the defense on appeal, emphasis was placed upon the fabrication of the minute books." United States v. Silverman, 430 F.2d 106, 120 (2d Cir. 1970).

This Court also observed - as nothing else then appeared in the record - that since the alteration of the minutes was to indicate approval for a loan to Silverman and authorize his making Christmas gratuity payments, the jury could have determined that Silverman was responsible for the alteration. 430 F.2d at 121. In that opinion this Court quoted from, and relied upon, that portion of Friedland's trial testimony, now challenged as perjurious, in which he stated that the only way he could tell that a change had been made in the minutes was by comparing his confidential report with the version before the trial court. (Ibid.). This Court, unaware, as was then the defense and the trial court, of the evidence now before it of the perjurious nature of that testimony, the prosecution's

knowledge of that and the prosecutor's memorandum "surmising" that Friedland himself was involved in the alteration of the minutes, drew the conclusion that undoubtedly the jury did to convict:

> "If this report was properly before the jury without violation of the attorney-client privilege, the jury could have concluded that the minutes had been altered after they were returned from Friedland and before they were surrendered to the grand jury investigation." 430 F.2d at 121. (emphasis added)

Friedland's testimony was undoubtedly designed by himself and the prosecutor to give exactly that false impression as the court below seemed on this proceeding now to be aware.*

Not only did Friedland's perjury and the prosecution's suppression of its knowledge and evidence of its nature infect petitioner's conviction at trial it resulted in an adverse determination of his appeal. This is not only a much more serious (trial and appellate) violation of petitioner's right to due process than is ordinarily before this Court, the prior Silverman opinion is an implicit finding here that, by whatever rubric is employed, the

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* "Silverman implies that Friedland testified that he did not know who altered the books. But the transcript shows that he was quite careful not to go beyond saying that he had no independent present recollection of the state of the books when he first viewed them. The Government had made it clear beforehand that all it would ask Friedland was if he had made a report, if the report was based on the minute books, if the report said that there was no approval in the books for a payment and a $2,000 loan to Silverman, and whether or not that conflicted with the state of the minute books as presented at trial. The Government did not go beyond this in questioning Friedland and neither did the cross-examination. Friedland never stated that he did not know who had altered the books." (123-4)

jury not only might possibly or probably have acquitted absent the perjured Friedland testimony, it cannot be assumed as did the Court below that it would not have. Cf. United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975); United States v. Silverman, 430 F.2d at 119.

For reasons hereinafter stated in this point, the Chlystun testimony under count 14 of the indictment had a similar tainted impact on petitioner's conviction as to all counts, on the determination of his original appeal and upon the proper decision of the instant petition.

At the outset, there was a disregard below of the standard of law to be applied on the issue of perjured testimony employed by the prosecutor to secure the conviction where:

> "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, U.S. , 96 S.Ct. 2392, 2397 (1976).

a. The perjured Friedland testimony:

In response to the petition's statement of the newly discovered issue, suppressed by the prosecution, of the knowing use of the perjured testimony of Jacob Friedland (7-15), respondent filed only a cursory affidavit of the Assistant United States Attorney in charge of the prose-

cution against petitioner (90-2). That affidavit in no way asserts the truthfulness of Friedland's testimony, it implies the contrary (92). Instead, the very prosecutor who secured immunity for Friedland* and sponsored his testimony merely states, "once that immunity was granted, the government did not know what in fact his testimony would be." (91) (emphasis added). The original opinion denying the petition below adopted this approach:

> "First, the Government certainly did not know what Friedland would testify to before he took the stand." (122)
>
> "This was the first time the Government became aware of his testimony and there is therefore no factual basis for Silverman's contention that the Government offered his testimony with the knowledge that it was false. Indeed, the prosecutor had no advance knowledge of it whatever." (123)

*It would seem rather clear that when his affidavit in opposition was prepared (90-2), the prosecutor was unaware that petitioner's application under the Freedom of Information Act would reveal that the prosecutor had written a memorandum to the Department of Justice in support of immunity to Friedland, which memorandum, of course, preceded Friedland's testimony, stating what Friedland's testimony was expected to be (110-11, 134-6). It is not without significance on the issue of the prosecution's foreknowledge of the Friedland perjury that (a) respondent its agents and attorneys have, so far, successfully kept this memorandum from petitioner and his counsel (Ibid., 173-175, 176-177, See Point II infra), (b) the court below found after examination, in camera, of the memorandum, that the prosecutor surmised that Friedland was involved in the alteration of the union books (161), (c) after revelation of petitioner's present knowledge of the existence but not the contents of his memorandum, the prosecutor made no further representation as to what he knew concerning the nature of Friedland's expected testimony. Cf. Giglio v. United States, 450 U.S. 150, 153, 92 S. Ct. 763, 766 (1972).

The second opinion below took the same approach, "the Government could not have been certain beforehand what Friedland's testimony would be . . ." (161).

But this is no answer to the petition herein, for the Supreme Court held in Napue v. People, 360 U.S. 264, 79 S. Ct. 1173 (1959), a conviction must fall when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269, 79 S. Ct. at 1177. This Court has often applied the rule:

> "The prosecutor has a duty not to use evidence known to be false, even if he did not instigate the perjury - - - ." United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969).
>
> "'a lie is a lie no matter what its subject, and if it is in any way relevant to the case,' reversal must follow if the prosecutor, knowing of the lie, leaves it uncorrected". Kyle v. United States, 297 F.2d 507,513 (2d Cir. 1961), quoting Judge Fuld's opinion in People v. Savvides, 1 N.Y.2d 554, 557 (1956)).

See also United States v. Pope, 529 F.2d 112, 114 (9th Cir. 1976).

The decision below was not only in error as to the applicable standard of constitutional law, it was erroneous as to the finding of essential facts. Brickman, whose affidavit states he witnessed Friedland's direction to another affiant to change the minutes (49), was disposed of as adding nothing new since he was said to be general

counsel of the union who testified at the trial (121,127) when in fact, he was an independent arbitrator having no connection with petitioner or the union (48). After this error was brought to the court's attention, it then stated despite the fact it admitted that Brickman may not have been available to petitioner at the time of trial (163), that Brickman's proffered testimony was unnecessary since it would merely serve to "impeach" Friedland (164). What petitioner's proffer of Brickman's testimony was intended to establish was that Friedland's trial testimony was false and deliberately so, i.e. perjurious, which is "impeaching" but which, when knowingly allowed to stand by the prosecutor is of a considerably more serious constitutional consequence. Kyle v. United States, supra. Moreover, "impeachment" goes to credibility and even where the false testimony allowed to stand goes only to that issue - as it was not so limited here - the conviction is void. Napue v. People, 360 U.S. at 269, 79 S. Ct. at 1177; Giglio v. United States, 405 U.S. at 154-5, 92 S.Ct. at 766.

Similarly rejected were the affidavits of the two union employees, the other witnesses to Friedland's direction that the minutes be changed (127, 164). Their unheard

testimony was also dismissed because, as union employees, they were said to be under the domination and control of petitioner (124). Yet their affidavits state that they were afraid to confer with petitioner or his attorneys until recently because they had been repeatedly subpoenaed before grand juries, the Department of Labor and the I.R.S., told they were targets, promised (threatened with?) immunity which was not forthcoming (27-30, 46), prosecutorial tactics which effectively suppressed this testimony (10-11, 15). The very prosecutor concerned in his - the only - affidavit in opposition (90-2) made no attempt to deny that he had engaged in those devices to that end thus admitting by silence that he had done so (107-09). Although there was nothing in the record in this proceeding to the contrary and nothing in the trial record on this issue (nor did any of these three witnesses testify at the trial), the decision below rejected petitioner's showing out of hand (164), without a hearing. This was error requiring reversal because, even though the judge below was the same judge who presided at petitioner's trial and sentence, the above stated facts and issues were dehors the record and thus not subject to summary dismissal. Sanders v. United States, 373 U.S. 1, 20, 83 S. Ct. 1068, 1079 (1963).

For the same reason it was error for the court below to reject petitioner's claim on the argument that "it cannot be assumed that [Friedland] did not [cause the minutes to be altered] at the direction, explicit or implicit, of the defendant Silverman..." (127-8). On this assumption, unsupported by the record, the decision below concluded that a jury would not reach a different result than that at trial (128). This overlooks the fact that the information as to Friedland's false testimony was in the withheld and undisclosed memorandum of the prosecutor. Cf. United States v. Agurs, supra:

> "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."
> U.S. , 96 S.Ct. at 2401.

Even if the test applied by the Court below were correct -- which it clearly was not -- the posture of the case before the jury would have been vastly different had the

facts withheld by the prosecution been presented. As this Court's opinion on the original appeal so cogently demonstrates, the jury had before it evidence of the change in the minutes and no evidence as to the circumstances of that change; the jury must have concluded, therefore, that the change was made or instigated by Silverman and this was unquestionably lethal to his assertion of innocence. 430 F.2d at 121. If, on the other hand, the jury had before it evidence that Friedland was told of the events at the Executive Board meeting by union officers other than Silverman, and that, without consulting Silverman, he then and there directed the union employees to add additional language to the minutes, which they then did, then the taint of deliberate fabrication on Silverman's part disappears. (9-10). It matters not whether Friedland though he was acting in Silverman's interest or what the Executive Board actually decided; the fatally prejudicial effect of the evidence as it came out was the inference that Silverman had ordered a fabrication of the minutes with the intent to deceive the government investigators and out of a consciousness of wrongdoing which affected all counts. Were the jury given evidence that Friedland instigated the change, without

Silverman's involvement, the jury would have been faced with an entirely different case.

Equally fallacious, both factually and legally, is the ruling in the opinions below that the defense counsel made a "tactical decision" to urge that no change in the minutes had in fact been made and that this tactical decision is "binding" upon Silverman (125-6, 163). This ruling, too, misconceives the test applicable to withheld evidence. Moreover, it evinces unrealistic appraisal of the options actually available to defense counsel and those that should have been available to him. It is not enough to state that defense counsel made a "tactical decision" to pursue a different line of attack; that is not the issue. The pertinent inquiry is whether at the time defense counsel made that decision he possessed the facts that should have been made known to him so that he could have made an informed decision. The answer to that inquiry is a resounding "No".

As matters stood, defense counsel was confronted by Friedland's denial of personal recollection as to the circumstances of the changes which, he testified, his written report indicated to have occurred. Defense counsel was without the ammunition in the files of the prosecution

either to bring out the perjury or even to prod Friedland's recollection concerning his own involvement. Defense counsel was also without knowledge of the change itself. There was no reason to think that an accusatory question as to whether Friedland was not himself the cause of the change would have elicited anything other than a damaging denial of involvement, a denial which the defense would have been weaponless to refute. Were defense counsel possessed of the ammunition which the prosecution wrongfully withheld, then his options would have been truly informed, his entire approach undoubtedly different, and the impact of the Friedland testimony diametrically opposed to that actually given.

b. The Chlystun perjury

The Agurs ruling also indicates the further error below on the issue of Chlystun's crucial but perjured testimony, which the prosecutor had reason to believe it to be. That issue was dismissed as merely seeking to relitigate a trial issue, since, if the prosecution could have investigated the events further, so could the defense. (128-9)

But petitioner's claim was that the prosecution had

sufficient information to put it on notice that further inquiry would have demonstrated that Chlystun's testimony was false (15-18, 114) which information was in the prosecution's files (17-18, 114) but not disclosed to the defense at the trial. That the decision below erred is shown by the ruling in Agurs that the standard to be applied is "that the prosecution knew, or should have known, of the perjury." U.S. , 96 S.Ct. at 2397 (1976), (emphasis added). It is only consonant with the prosecutor's duty to see that justice is done that he should be held to no less a standard than ordinary citizens who are culpable if they blind themselves to the facts or fail to make indicated inquiry in false statement cases. See United States v. Sarantos, 455 F.2d 877, 880-1 (2d Cir. 1972); United States v. Jacobs, 475 F.2d 270, 287-8 (2d Cir. 1973); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971). See also Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), and the opinion of Chief Justice Burger in Giglio v. United States, 405 U.S. 153-4, 92 S.Ct. at 765-6 (1972).

Since respondent's answer to the petition amounted to little more than a motion to dismiss, the facts alleged in the petition are taken as true and so taken indicate the

petition should be granted. Housden v. United States, 517 F.2d 69, 70 (4th Cir. 1975). The correctness of such relief here is even stronger, for the respondent undertook to answer the petition and utterly failed to traverse any of the legal or factual issues raised. Cf. Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969).

POINT II

A HEARING SHOULD HAVE BEEN HELD WITH THE RESPONDENT REQUIRED TO PRODUCE RELEVANT DOCUMENTS.

Although petitioner believes he was entitled to vacation of his conviction on the uncontradicted showing he made, it was also clearly erroneous for the court below to decide the petition without holding a hearing and requiring respondent to produce relevant material in its possession for use by petitioner and his counsel as well as the Court.

a. Requirement of a Hearing.

Petitioner below met the standard for a hearing established by this Court in United States v. Tribote, 297 F.2d 598, 600 (2d Cir. 1961), "that appellant is entitled to a hearing only if his petition alleges facts which would support a claim of deprivation of constitutional right . . ." The knowing use of perjured testimony on two essential counts,* Point I, supra, is undeniably such a claim, particularly here when it may very

*Here the perjured testimony was not on a peripheral matter as in United States v. Stofsky, 527 F.2d 237, 246-7 (2d Cir. 1975), but on the essence of the offense alleged (the payment of money to petitioner for a Welfare Fund asset in Count 14 and the fabrication of union records in Count 18).

well have infected the remaining counts (8, 18). See United States v. Barash, 365 F.2d 395, 403 (2d Cir. 1966); United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958).

When, as here, the respondent has refused to produce copies of reports under its control (e.g., here, the prosecutorial memorandum stating the basis for the immunity grant to Friedland which admittedly reflects "suspicion" of involvement in the very offense which he denied knowledge of but in which he implicated petitioner), this Court has held that an evidentiary hearing is required. United States v. Keogh, 391 F.2d 138, 149 (2d Cir. 1968). At such a hearing, petitioner and counsel would be given an opportunity to show how the material not produced or disclosed at trial would have affected the result. Ibid. No such opportunity was granted below.

A judge who has previously tried and sentenced a 28 U.S.C. §2255 petitioner must not deny a petition on his knowledge of the case where, as here, the petition alleges facts outside of the case record as a basis for a claim of violation of constitutional rights. Sanders v. United States, 373 U.S. 1, 19-20, 83 S.Ct. 1068, 1079 (1963).

Under the above standards, petitioner here was, at

the very least entitled to a hearing.

b. Production of Evidence.

It is impossible to hold the evidentiary hearing contemplated by Sanders and Keogh unless the evidence in possession of the government is produced for use by petitioner and counsel. See Townsend v. Burke, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255 (1948). Without such production proper review is impossible in this Court, United States v. Keogh, supra, 391 F.2d at 149, only with such production is appropriate review possible. See United States v. Granello, 403 F.2d 337, 339 (2d Cir. 1968).

When dealing with the government's duty to produce undisclosed material helpful to the defense, the Supreme Court recently held in United States v. Agurs, supra:

> "We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution." U.S. 96 S.Ct. at 2399.

An in camera examination of such material as was done below, is no longer tolerated in this circuit. United States v. Youngblood, 379 F.2d 365, 369-70 (2d Cir. 1967). Cf. Alderman v. United States, 394 U.S. 165, 182, 89 S.Ct. 961,971 (1969). Assertion of privilege and secrecy to

deprive petitioner of evidence to show his conviction was wrongful is unconscionable and nullifies the conviction. United States v. Reynolds, 345 U.S. 1, 12, 73 S.Ct. 528, 534 (1953), and cases there cited.

No formal procedure is necessary to require respondent to produce such material. It may be ordered by this Court, United States v. Keogh, 391 F.2d at 149, or by the district court, Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969). It may of course also be secured by a subpoena duces tecum. Sullivan v. Dickson, 283 F.2d 725, 727 (9th Cir. 1960) - "a subpoena duces tecum would issue as a matter of right," 283 F.2d at 727.*

*Curiously enough, the court below relied upon Sullivan v. Dickson, supra, to deny enforcement of petitioner's subpoena, on the ground that no hearing was scheduled by the court. In Sullivan, enforcement of the subpoena was denied because it was for a third party and no petition had been filed. Here the subpoena was on respondent, the petition already filed and after requests to the respondent's attorney and the court had proved unavailing. It cannot be that a district court can cut off a petitioner's right to production of essential evidence by denying another right of a hearing. The suggestion was belatedly made by respondent below that use of a subpoena duces tecum was not available to petitioner. This argument should have been raised on a motion to quash before a decision was reached on the petition not after decision, based, at least in part, on petitioner's failure to produce the very evidence called for by the subpoena. In any event the argument is simply wrong. See Haney v. Woodward & Lothrop, Inc., 330 F.2d 940, 942 (4th Cir. 1964); Allen Bradley Co. v. Local Union No.3, etc., 29 F.Supp. 759, 761 (S.D.N.Y. 1939); see also Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 767 (D.C. Cir. 1965).

The important thing is not what means are used to secure production of the essential material from respondent but that it be produced for use by petitioner and his counsel, as well as the court, before action is taken on the petition. Petitioner tried all the above means, as well as direct request of the United States Attorney's office but production was not forthcoming. Over a year prior to the filing of the petition below petitioner's counsel sought from the United States Attorney's office production of the trial exhibits and Sec. 3500 and Brady material (18). Although this request was agreed to (Ibid., 181-2) only a few files were made available for counsel's inspection which contained little of the requested material (Ibid., 169-71). After the petition had been filed, attorney for respondent wrote counsel for petitioner that fifteen (15) additional files had been produced in the former's office but that he had unilaterally determined there was no material therein useful to petitioner (183), contrary to the procedure previously established for inspection of such records (169-71, 181-2). Petitioner's

counsel's request that the agreed upon procedure be complied with and that the 15 additional files be produced in time for the due date of petitioner's reply (182) was ignored (170-1). Respondent's attorney also stated that he "had directed that further search be conducted" (183) but no report was ever received on that search (171).

The refusal to allow this necessary production, discovery and inspection, necessitated the service of a subpoena duces tecum by petitioner therefor, returnable March 9, 1976 (138A, 170-1). That subpoena was admittedly ignored by respondent (144). Counsel for petitioner in an affidavit stated that his office had received a telephone call from respondent's attorney on March 9, 1976, relating that the latter had applied to the chamber's of the court below for an adjournment of the subpoena (134, 151). In an unsworn memorandum, respondent's attorney stated he had merely advised the court below that he had been served with the subpoena without requesting an adjournment (144 n). The second opinion below recited that no such request for adjournment of the subpoena had been made, none granted, and that the court below had received no "formal" notice of the subpoena until the Rule 60(b) motion was filed after the

court's first opinion, May 7, 1976 (157-8). However that may be, respondent and the court below were well aware of petitioner's requests, motions, and subpoena, and the essential nature of the material sought to the issues raised by the petition long before either decision was reached below.

Nonetheless, despite notification of what was required, and why it was material, and the failure to honor the inspection procedure agreed to, honor the subpoena (or move to quash it) or rule on the motion, and the in camera submission of the Maloney memorandum, respondent argued (172) and the court held (159-60) that respondent had made full production, over petitioner's vigorous objections (149-50, 169-71).

That was fundamentally unfair in this case not only in and of itself but also because the court below held that petitioner had failed to make sufficient showing on the very issues to which the items sought to be produced were material. (126-7, 162-3).

POINT III

ON REMAND THE PROCEEDING SHOULD BE REFERRED TO ANOTHER JUDGE.

Ordinarily, it is no ground for disqualification that the judge on a petition under 28 U.S.C. §2255 is the same judge that presided at the original trial and sentence. Zovluck v. United States, 448 F.2d 339, 343 (2d Cir. 1971). Petitioner here, in recognition of that rule, originally made no resistance to the assignment of the proceeding below to the judge who had presided at the original trial and sentence.

However, when it appeared that the judge below felt so familiar with the case that no appearance, argument or hearing was granted petitioner or counsel despite the totally new grounds advanced for relief and the judge's characterization of the petition as "a gross imposition on the Court" (132), petitioner did request that the proceedings be referred to another judge (133, 138). It is respectfully submitted that should this case be remanded for any other reason than to follow the direction that the relief requested in the petition be granted, it should be brought before another judge in the Southern District for much the same reasons as caused this Court to make a

similar ruling in United States v. Stein, F.2d. (2d Cir., Dkt. No. 76-1299, 10/22/76, slip sht. op., p.211). In Stein, as here, the sentencing judge had refused to vacate a sentence imposed on a totally mistaken view of the facts (slip sht. op., p. 223), without disclosing facts favorable to the petitioner in a report submitted in camera (slip sht. op., pp.225-6) and without granting petitioner and his counsel the right to be heard in rebuttal, comment or suggestion (Ibid.).

Below, in the instant case, the court assumed it had previously heard the testimony of the independent arbitrator Brickman when it had not (120-1, 127). After the error was pointed out, the Court ruled that the unheard testimony could not change the judge's mind (164) and refused to hear or preserve the testimony of Brickman, a respected man of advanced years (Ibid.).

Holding that petitioner had failed to show knowing use of perjured testimony or suppression of evidence helpful to the defense by the prosecution (122), the court below refused to grant petitioner's motion to produce the very files, memoranda and other evidence, by subpoena or otherwise, which would have called upon the prosecution to produce evidence, admittedly in its possession, germane to

those very issues (156-61). In addition the judge below applied a clearly erroneous standard to the prosecution's knowing use of perjured testimony, holding that petitioner had to show that the prosecutor knew that Friedland's testimony was to be false before it was given (123, 161), the position taken below by the prosecutor (91), although the leading case of Napue v. People, supra, cited by petitioner, holds it to be the duty of the prosecutor to correct perjured testimony of his witnesses after it is given, even if he did not know beforehand the witness he sponsored would testify falsely (here a questionable assumption).

This is an even stronger case than Stein for reversal and remand before another judge for in Stein there had at least been an opportunity for that petitioner and his counsel to be heard at length at an earlier point (slip sht. op., p. 224). Below, this petitioner and his counsel were not permitted to be heard at any time, at any length, however brief. Therefore, the ruling which this Court found compelling in Stein (slip sht. op., pp. 221-2) should be controlling here:

> "...it is the careless or designed pronouncement of sentence on a foundation so extensively and

> materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process."
> (quoting Townsend v. Burke, 334 U.S. 736 at 741 (1948))

This Court stated in United States v. Bryan, 393 F.2d 90, 91 (2d Cir. 1968), "that at least in a multi-judge district such as the Southern District of New York where the necessity of retrial before the same judge is not present, the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality."

While the actual trial time in the criminal case from which the present proceeding arises was somewhat shorter than that in Bryan, it is plain that the judge below regarded this case as long and onerous (117-19, "a gross imposition on the Court" - 132) so that the suggestion in Bryan should become the ruling here. A judge can become too "familiar" with a case to be able to pass upon matters that must be considered de novo. See United States v. Bryan, 393 F.2d at 91.

CONCLUSION

FOR THE FOREGOING REASONS, THE DECISIONS BELOW SHOULD BE REVERSED, THE PETITION GRANTED AND THE CONVICTION VACATED OR A HEARING HELD BEFORE A NEW JUDGE AFTER FULL DISCOVERY, PRODUCTION AND INSPECTION.

Respectfully submitted,

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